

Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters

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As I listened to various participants at the Mashup/Remix Conference, one question was often repeated: does remix matter?

In this brief, rather freewheeling comment, I want to address this question on two levels. The first level is the critique of importance: isn't mass culture still ahead of remix culture in importance? After all, video remixers are generally drawing from mass-produced TV and movies, bloggers citing the *New York Times*, and so on. Jack Balkin has offered a rousing defense of the value of linking, commenting, quoting, and otherwise piling on that I will not here repeat in any detail.¹ The "long tail" of communication allows people to find the content that is most suited to their particular interests, improving the quality of the information environment for themselves even if other people don't care about the same people, books, or events. On the other side of the equation, there are important questions about the extent to which mass culture is, or ever was, mass: the most popular TV shows are watched by an ever-shrinking fraction of the population, and, since we started measuring such things, it's been clear that African-American popular media, for example, are different from white American popular media.²

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¹ See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

² See, e.g., Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 431 n.104 (2000) (detailing racial differences in top-rated television shows, popular magazines, internet access, and popular books).

But the deeper question is the Meiklejohnian one of the appropriate subjects of civic concern: does pop culture matter? So what if people post their funny South Park remixes online?³ I come at this from a background in media fandom—this is comprised of largely female communities whose members create and enjoy new works based on mass media texts, often focusing on sexuality and gender roles. Media fandom is far from united, and many of its productions aren't feminist by anyone's definition. However, in its focus on women's interests and women's pleasures it at least offers some options rarely available in commercial mass media. My background assumption is that pop culture matters because it offers people so many prominent lessons in how to live and what to value. This is also why remix matters: it allows people to adopt, modify, reject, question, and otherwise react to those lessons.

As a broader answer to the question of significance, I want to suggest that remix is the basic human condition. We are born, after all, with mixtures of our parents' genes. That heritage is more or less apparent, more or less salient, depending on individual characteristics and depending on the purposes for which we're investigating relationships between persons. The same is true of the works we create.

Mashup can appear as a kind of Frankenstein's monster: notable for its stuttering gait, its not-quite-rightness compared to naturally (i.e. professionally) produced content.⁴ In some sense, it's striking that it walks or entertains at all. Being stitched together means that a

³ I think people who affirmatively argue that pop culture is unimportant, compared to the real challenges we face today, are often proceeding in bad faith. Very few of them are more actively combating genocide in Rwanda, or whatever the more important thing is, than their interlocutors. Certainly such critics rarely ask whether a person invested in pop culture can also be doing other things in the world.

⁴ For an extreme view that creativity is beside the point and mass production is the only value worth pursuing, consider the British government's vision statement for the digital economy: the government intends to seek "a digital framework for the creative industries and a commitment to the creative industries grounded in the belief that they can be scaled and industrialised in the same way as other successful high-technology, knowledge industries." United Kingdom Department for Business Enterprise and Regulatory Reform, *Digital Britain—Final Report*, June 2009, at 105, *available at* <http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf>. Are movies—even summer blockbuster movies—really just like transistors, products ideally to be stamped out on an assembly line? If we disagree, and want to insist on the human element even in our scaled-up consumer culture, then I would suggest that we should honor, rather than try to eliminate, the messiness and inevitable differences we find in varying creative works.

work (or a monster) wears its antecedents on its outsides, rather than having its family tree be the kind of thing that can easily be set aside. We can forget, at least for a while, that “original” works always have sources. But the remix does not allow us the illusion that we are dealing only with an individual—self-produced and independent. This is reassuring for some people while discomfiting for others.

This stitched-together quality of the mashup has echoes in the legal analysis of remix, which generally proceeds under the copyright’s rubric of fair use. Two axes of discussion loom largest in the fair use analysis: commerciality and transformativeness. In both areas, the conventional legal definitions are a poor fit in the context of many remixes. This is especially true when remixes are created by fans of the original, who are creating at least in part because they love (and sometimes love-hate) the existing work.

I will begin with commerciality, which is probably even more fraught than transformativeness. This is because many copyright owners who are willing to litigate perceived infringement care more about money than about being remixed. Copyright law has an expansive and perhaps all-encompassing definition of commerciality; sometimes “commercial” use includes sharing files for free, as the district court and the court of appeals held in the *Napster* case.⁵ Like *Napster*, YouTube is a commercial venture. But commercial for whom? The people uploading videos are doing it for free, and most have no hope or intent of making money. For purposes of a fair use analysis of content uploaded by an individual creator, the commercial hopes of the conduit hosting the content shouldn’t be the key to a fair use analysis, any more than a paint store’s receipt of money for paint and canvas makes all painting commercial. As I have argued elsewhere, people who create with no hope of monetary reward make different things than people who want to participate in the money economy, which justifies special fair use treatment for freely shared remixes.⁶

More generally, commercial and noncommercial spaces interpenetrate, and cannot readily be disentangled. Fans generally don’t make money from fandom; particularly in female-dominated media fandoms, there is a strong norm against anything that smacks of commercialization. This is thought to be both legally and ethically

⁵ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001); *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000).

⁶ Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497 (2008).

protective: fans argue that they are good consumers and that their fandom encourages them to buy more of the official product. This position, however, entails that other people and entities—professionals, convention organizers, Google—regularly do make money from fans. Abigail De Kosnik has therefore asked whether we should retreat from fan culture’s valorization of noncommerciality: fans are only noncommercial in a particular sense, and that sense is that if there is any money on the table, it certainly won’t be flowing towards the fans.⁷

As De Kosnik’s analysis makes clear, there are at least two relevant positions: (1) fans should have to pay copyright owners to be allowed to share their creative works with others, or (2) somebody else should pay fans for sharing, perhaps other fans. The latter possibility in theory could offer some successful fans an alternative path to financial success without “selling out” or conforming their content to the sexual/political/artistic mainstream. Avoiding option one has been a fan priority, even though the strategy of embracing noncommerciality may badly position fans to take advantage of option two, should option two become a realistic prospect.

Fan culture’s focus on noncommerciality makes sense, given that mass-media content owners are actively looking for new sources of revenue, and licensing noncommercial works could be reconceived as part of a business model. The legal analysis of commerciality in fair use reinforces the felt need to avoid taking money, but it also raises questions of distributional unfairness. Rap artists made lots of money from sampling, but then the lawyers showed up: millions of dollars changed hands and now sampling is either licensed from start to finish or it is back underground again.

Commerciality, then, is a messy concept, both practically and ideologically. The complications increase when we add transformativeness to the mix. What is the meaning of “transformation” – especially when a work that has been “transformed” can also be a derivative work to which the copyright owner has exclusive rights?⁸ Transformation is generally defined in fair use doctrine as adding “something new, with a further purpose or different character, altering the first with new expression, meaning, or

⁷ See Abigail De Kosnik, *Should Fan Fiction Be Free?*, 48 CINEMA J. 118 (2009).

⁸ See 17 U.S.C. § 101 (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, *transformed*, or adapted.”) (emphasis added).

message.”⁹ This vague concept has to be put into action in particular cases, however, and, as the concept of quotation illustrates, assessing transformativeness can require us to have very detailed aesthetic theories, even if we don’t articulate them.

For text, quotation is barely interesting in fair use law: quoting a published work in another work is nearly categorically fair use, at least as long as quotation and paraphrase from a single source don’t make up a substantial portion of the new work.¹⁰ Jonathan Lethem, a prominent writer, recently went so far as to compose an article in *Harper’s Magazine*, one of the nation’s preeminent publications, entirely made of (unattributed) quotes from other people.¹¹ He had little to worry about, because by mixing and matching he created a powerful argument for the utility of quotation, adding precisely the new meaning and message that make a transformative use. For images and video, the law is more confused. Images are powerful, and lawyers don’t know how to deal with them as successfully as they do with words. Images and video are hard to dissect; they need to be copied in order to talk about them persuasively, as with the Zapruder film.¹² Yet they also seem expressive and thus deserving of protection against copying. Changing the context of an image can change its meaning, but even with a thousand words it can be impossible to explain how or why. Music is even worse; lawyers simply don’t think well about music. We know music can be subversive, transformative, political, and all the other things that speech can be, but it’s still really hard to explain why music should count as speech. Without an

⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹⁰ *See, e.g.*, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (opining that even “substantial quotations might qualify as fair use in a review of a published work or a news account of a speech”); *cf.* Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1450 (1997) (“[T]he right to quote is essential to the progress of knowledge. ‘New ideas’ are never wholly new—they use prior ideas as building blocks, whether by accepting or rejecting them. The debate implicit in this building process necessitates quotation. Think of history, biography, journalism, commentary, criticism, scholarly analysis: How could any of these endeavors function without a right to quote in support of argument?”) (footnote omitted).

¹¹ Jonathan Lethem, *The Ecstasy of Influence: A Plagiarism*, HARPER’S MAG., Feb. 2007, at 59.

¹² *Time Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 144-46 (S.D.N.Y. 1968) (where Time Inc. and Abraham Zapruder released both a *Life* video showing the 1963 J.F.K assassination and magazine stills of the video, and the defendant incorporated sketches of these stills into his book about the assassination. Because of the fair use doctrine, the district court did not find the defendant to be in violation of copyright laws.).

account of why musical quotations are important—an account that can be put into the words with which lawyers are most comfortable—musical fair use issues will continue to seem intractable. Or, more likely, the concept of musical fair use (outside of parodic lyrics) will be incomprehensible.

Can we assess transformativeness at all, or do we need to throw up our hands in despair? I believe that transformativeness can work as a fair use concept if we are willing to take remix seriously as the foundation of human culture. I will borrow here from Donna Haraway's important essay on cyborgs and feminism.¹³ Ironically, I can't do justice to her concept here because I'm creating yet another hybrid by morphing it for my own purposes. Cyborgs mix the biological and technological, and in that, they are like artists. Most saliently, cyborgs are like digital artists: melding imagination with bits and megabytes. In fact, Haraway writes, "[w]e are all chimeras, theorized and fabricated hybrids of machine and organism; in short, we are cyborgs,"¹⁴ whether or not we notice how we've outsourced our memories to our Outlook calendars or any of the other ways in which human culture is machine culture.

Fan cultures wear their hybridity proudly, mixing commercial and noncommercial, dominant perspectives and subcultural critiques, constructing the new out of bits and pieces of the existing world. As Julie Levin Russo writes of fan videos, such fanworks "celebrate, critique, and de- or reconstruct mass media in what Anne Kustritz calls a 'genre commensurate form,' engaging the source via its own images (along with their webs of intertextual connotation) and visual language. In many cases, they render queer dimensions of these sources visible by telling stories of same-sex romance (known as 'slash') through sophisticated viewing and editing techniques. Whatever their explicit themes and narratives, they represent a queer form of reproduction that mates supposedly incompatible parents ('original' media source and 'original' creativity) to spawn hybrid offspring."¹⁵

¹³ Donna Haraway, *A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century*, SOCIALIST REVIEW (reprinted and updated in SIMIANS, CYBORGS AND WOMEN: THE REINVENTION OF NATURE, 149 (Routledge, Chapman and Hall 1991)).

¹⁴ *Id.* at 150.

¹⁵ Julie Levin Russo, *User-Penetrated Content: Fan Video in the Age of Convergence*, 48 CINEMA J. 125, 126 (2009) (citations omitted).

In a cyborg world, meaning is always changing, circulating, negotiating. The cyborg is built on contradictions, which she transmutes into complexities. This is a helpful metaphor because one challenge of defending women's fanworks before the law is to protect them from charges of over-investment, incoherence, or unintelligibility from outside. As one fan writes, building a gift culture that is fundamentally entwined with mass, consumer culture can be hard to understand from the dominant perspective:

[N]on-fans . . . see all this effort, all the work that goes into fanwork, and they are so immersed in the invisible reality of capitalist thinking, that they honestly can't conceptualise that people might genuinely not give a shit about selling that work for money. They can't understand an economy of giving things away or sharing. They think it has to be lip-service, that there's a secret agenda . . .

But what I think makes the chasm even harder to bridge is that from the outside, fandom looks like it is all about consuming—because, in part, that's exactly what it is. Consumption is this great paradox that fans wrap their heads around without too many problems—we have a gift economy, yes, but it is built around buying primary texts, tie-in merchandise, franchised goods and services. For the most part we don't even blink at negotiating these two ideologies; I mean, we live with multiple realities in our fanfiction every day, so believing a dozen contradictory things before eating our Star Wars Special Edition Cornflakes is what we're trained for

To the non-fandom side, however, it makes no sense at all. It looks like hypocrisy, I suspect, rather than living in a multiple-choice culture. Capitalism talks a good talk about supply and demand, but is too focused on the next big hit to really mean it: you can have any colour as long as it's black.

This is why I've come around to the idea that valuing something without a monetary price-tag is one of the

most subversive everyday acts now possible in capitalist culture.¹⁶

Lawyers, and especially judges, may not easily understand the context of remix cultures like media fandom, in which each contribution enters into a community with various traditions, expectations and understandings, so that layers of meaning may only be apparent to people already familiar with the subject, or at least the aesthetics of the community. If the standard aesthetic response of lawyers is “I know art when I see it,” the way Potter Stewart knew obscenity when he saw it, then we need to add Catharine MacKinnon’s response to Stewart: you need to “[know] what I know when I see what I see.”¹⁷ To the extent that we are all hybrids, built out of pieces of the world that we’ve incorporated into ourselves, the apparent contradiction in building on mass culture and making something non-mass out of it will be easier to manage.¹⁸

Hybridity also implies a relationship to the previous generation that isn’t univocal. A hybrid is neither out to destroy its predecessors nor to keep perfect faith with them. This is a useful model for remix culture, especially fanworks, where the relationship to the mass media source is often complicated. Many fanworks don’t fit the prototypical fair use of biting, mocking criticism that targets aspects of the original in order to reject them. And this is a strength, not a weakness: approaching a mass media work with an understanding of what makes it attractive makes it much easier to communicate with other people who like it as well. Those people are the ones most in need of commentary on it. Indeed, even the canonical transformative uses aren’t pure rejections of their sources/targets: neither 2 Live Crew’s *Pretty Woman*¹⁹ nor Alice Randall’s *The Wind Done Gone*²⁰ ignore what was attractive about the original.

¹⁶ Cupid’s Bow, <http://cupidsbow.livejournal.com/266405.html> (Dec. 15, 2007, 22:42 UTC).

¹⁷ Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 3 (1985).

¹⁸ See Haraway, *supra* note 13, at 149 (calling her project ironic, because irony “is about contradictions that do not resolve into larger wholes, even dialectically, about the tension of holding incompatible things together because both or all are necessary and true”).

¹⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (reversing a ruling against fair use when 2 Live Crew’s “Pretty Woman” copied the most recognizable musical element and the first line of Roy Orbison’s “Oh, Pretty Woman”).

Alice Randall in particular made quite clear that she wrote her version of *Gone With the Wind* because the original had been so powerful for her personally, not just because it had been key to popular images of the antebellum South. Randall's account of how she came to write *The Wind Done Gone* is a familiar one in fandom: love mixed with pain, and a decision to rewrite the story to make it better for herself. Indeed, Randall begins her explanation of why she wrote the book with a different mass media fandom, to which she had the same kind of intense, mixed reaction:

When I was a girl of six or seven I fell in love with the television series Batman. And like many loves, there was something I hated in it too: I hated the fact that no one who looked like me was in the story. For two weeks after that awareness I was frustrated. The third week I wrote myself in. I literally began to write out Batman scripts and write a part for me into them, a Bat Girl part. My Bat Girl wasn't a sidekick; she was a catalyst; every time I wrote her into a story, she changed its ending . . .

Later, when I read *Gone With the Wind* (GWTW), I fell in love with another pop culture artifact. This was a troubled love from the beginning. I had to overlook racist stereotyping and Klan whitewashing to appreciate the ambitious, resilient, hardworking, hard-loving character who is Scarlett. Like so many others, I managed to do it. Then one day, rereading the novel, an enormous question arose for me from the center of the text. Where are the mulattos on Tara? Where is Scarlett's half-sister? Almost immediately I knew I had to tell her story, tell the story that hadn't been told. Tell it because the silence injured me.²¹

²⁰ See *SunTrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001) (vacating a lower court's ruling, which granted a temporary restraining order and permanent injunction against the publication of an allegedly copyright-infringing book, because the ruling violated the First Amendment).

²¹ A Conversation with Alice Randall, http://www.houghtonmifflinbooks.com/readers_guides/wind_done_gone/index2.shtml#conversation (last visited Dec. 22, 2009).

As Randall's experience illustrates, the prototype of transformative fair-use-as-attack turns out to require flattening out the examples used to populate the category.

Once we recognize the richness and multidimensionality of transformativeness, we can assess fair use claims more usefully, paying attention to the way a new remix fits into its broader context. We need not require a direct assault to recognize that a work has added a new meaning worthy of protection as a fair use. Drawing on Carol Gilligan's concepts of moral maturity, based on studies of certain women's moral reasoning, I would argue that copyright's theory of creativity must value both independence (respect for dissent and for new messages) and connection (respect for community and for connections drawn between works).²²

A cyborg's work is never finished, its boundaries never entirely certain. Against a high-protectionist version of copyright that insists on ever-lengthening copyright terms and moral rights against alteration of a work in unfavorable ways, cyborg fluidity insists that borders between works matter because they are permeable. For example, we have seven Harry Potter books which have inspired over a hundred thousand Harry Potter stories by fans; neither the books nor the fanworks exist as entirely separate artifacts, but all are embedded in a broader culture. Asserting their creative independence and their creative embeddedness at the same time—their basis in, and distinctions from, the commercial economy—fanworks offer a working model of hybridity in creative production, one the law would do well to recognize. It's no accident that Haraway invokes rewriting as a central characteristic of her productive cyborgs:

Contests for the meanings of writing are a major form of contemporary political struggle. Releasing the play of writing is deadly serious. The poetry and stories of US women of colour are repeatedly about writing, about access to the power to signify Cyborg writing is about the power to survive, not on the basis of original innocence, but on the basis of seizing the tools to mark the world that marked them as other.

The tools are often stories, retold stories, versions that reverse and displace the hierarchical dualisms of

²² CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

naturalized identities. In retelling origin stories, cyborg authors subvert the central myths of origin of Western culture.²³

This brings me back to the question of whether we ought to care about remix and remixers. Remix culture often has to fight off the intuition that free speech, to be really respectable, ought to be political, at least in the general sense of operating as social criticism even if it doesn't intervene in electoral politics. What's so important about remixing a favorite TV show to demonstrate how two characters are meant for each other?

I will set aside the valuation of engagement in popular culture as obviously less than engagement in "real" life. But even if we only care about what people do in the political sphere, the presence of remix culture is a vital indicator of the health of our discourse. The process of speaking produces more speakers.²⁴ Alice Randall began with Batman; her experimentation empowered her to take on Scarlett O'Hara and race relations. My own experience with blogging is another case in point: I was never a particularly shy speaker. But once I started blogging regularly, I became a lot more confident that everyone was entitled to my opinion. And my posts are, largely, derivative works: I summarize and discuss recent cases and talks I attend. Writing the summaries led me to realize that I had opinions on the contents, and I added those in.

For people who aren't sure they have things to say, the experience of actually saying things and getting feedback is liberating. "Who do you think you are?" is most often a question asked to suppress contribution. Sometimes it doesn't even need to be asked, because people have already internalized the message that they aren't worth

²³ Haraway, *supra* note 13, at 175.

²⁴ See Balkin, *supra* note 1, at 35 ("A democratic culture is valuable because it gives ordinary people a fair opportunity to participate in the creation and evolution of the processes of meaning-making that shape them and become part of them; a democratic culture is valuable because it gives ordinary people a say in the progress and development of the cultural forces that in turn produce them When people are creative, when they make new things out of old things, when they become producers of their culture, they exercise and perform their freedom and become the sort of people who are free."); Robert S. Rogoyski & Kenneth Basin, *The Bloody Case That Started from a Parody: American Intellectual Property and the Pursuit of Democratic Ideals in Modern China*, 16 UCLA ENT. L. REV. 237, 258-59 (2009) (discussing the profound political effects of making remix video on Chinese youth, who learn to see themselves as democratic agents; noting that "[t]his popular consciousness has the potential to expand beyond cultural matters alone, into a burgeoning political consciousness, or perhaps even activism").

listening to. People define themselves by what they know and what they love (and sometimes by what they hate). Making a creative work, especially a creative work that comments on an artifact that other people will know and have opinions about, gives people their own answers to that question, and empowers them to keep talking. These capabilities are the backbone of a culture of creativity and critical/analytical discourse that is worth propagating and preserving. Who do *you* think you are?